

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

Louisville, Kentucky

LOUISVILLE-JEFFERSON COUNTY  
PUBLIC DEFENDER CORP. 1/

Employer

and

AMERICAN FEDERATION OF TEACHERS  
LOCAL 4590, AFL-CIO

Petitioner

Case 9-RC-17284

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record 2/ in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 3/
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 4/

**All full-time and regular part-time nonsupervisory staff attorneys, including law school graduates who are awaiting bar results, employed by the Employer at its Louisville, Kentucky facility, excluding all office clerical employees and all other professional employees, guards and supervisors as defined in the Act.**

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **American Federation of Teachers Local 4590, AFL-CIO.**

## LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB No. 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **September 10, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **September 17, 1999**.

Dated September 3, 1999

at Cincinnati, Ohio

/s/ Richard L. Ahearn /s/  
Richard L. Ahearn, Regional Director, Region 9

1/ The name of the Employer appears as amended at the hearing.

2/ Both parties timely filed briefs which I have carefully considered in reaching my decision. The Employer also attached an affidavit to its brief from the Employer's chief appellate defender, Frank W. Heft, Jr., in which he avers that his office has substantial contact with attorneys of the State Department of Public Advocacy in processing appeals and preparing various pleadings. The affidavit constitutes an out of court statement offered to establish the truth of the matters, without any evidence or contention that Heft was unavailable to testify at the hearing. Under such circumstances, Heft's affidavit cannot properly be made part of the record. *West Texas Utility Co.*, 94 NLRB 1638 (1951), enf'd. 195 F.2d 519 (5<sup>th</sup> Cir., 1952). Accordingly, the affidavit of Heft, attached to the Employer's brief, has not been considered in reaching my decision. I note, however, the matters covered by the affidavit were raised at the hearing and, in my opinion, are not relevant in resolving the issue in question whether the Employer is exempt from the Board's jurisdiction as a governmental entity. (See decision under footnote 3.)

3/ The Employer, a nonprofit corporation, provides legal representation to indigent persons in Jefferson County, Kentucky, including the City of Louisville, accused of crimes or mental states which may result in their incarceration. In performing its functions, the Employer provides approximately 40 percent of the public advocacy work in the Commonwealth of Kentucky. Contrary to the Petitioner, the Employer contends that under Section 2(2) of the Act it is exempt from the Board's jurisdiction as a governmental entity.

The Employer was originally incorporated on August 18, 1971, as a non-stock and non-profit charitable and educational corporation pursuant to Chapter 273 of the Kentucky Revised Statutes (KRS). The Employer was incorporated by three private individuals, including its current president, Robert C. Ewald. According to the Articles of Incorporation, the Employer was established to carry on exclusively public, charitable and educational activities within the meaning of Section 501(c)(3) of the Internal Revenue Code. In the fall of 1972, the Kentucky Legislature enacted Chapter 31 of the KRS, entitled Department of Public Advocacy. Chapter 31 of the KRS established the Department of Public Advocacy (DPA) as an independent agency of state government attached for administrative purposes to the Public Protection and Regulation Cabinet. Chapter 31 of the KRS embodies the policy of furnishing legal counsel and services to criminal defendants who are financially unable to procure representation so as to place them in a comparable position to those defendants who can afford an attorney. Pursuant to Chapter 31 of the KRS, the chief administrator of the DPA is the Public Advocate, an attorney, appointed by the Governor of Kentucky from a list of three nominees submitted by the Public Advocacy Commission (PAC). The PAC consists of 12 members made up of the deans or their designees of each of Kentucky's law schools and a number of members appointed by the Governor and Kentucky Supreme Court. The PAC provides general supervision over the Public Advocate and also reviews, adopts, and provides support to the General Assembly for budgets prepared by the Public Advocate. Chapter 31 of the KRS also provides several different methods for public advocacy systems to be established within Kentucky's various counties or districts. The record discloses, however, that Jefferson County is the only county in the State with 10 or more circuit judges and, therefore, pursuant to Chapter 31 of the KRS, must establish and maintain an office for district public advocacy.

Consistent with Chapter 31 of the KRS, in some counties, the DPA has established offices for district public advocacy that are staffed with DPA employees. The record also shows that other counties, or the DPA on their behalf, have contracted with nonprofit organizations or other groupings or associations of attorneys to provide a public advocacy system. Finally, the statute permits counties to directly establish and maintain an office for public advocacy either individually or in conjunction with cities within the county or with one or more other counties. The record does not disclose whether any county or district has selected this option.

On August 24, 1972, the Jefferson County Fiscal Court approved the Employer as the provider of legal services for indigents in Jefferson County. On November 30, 1972, the Public Advocate, then known as the Public Defender, approved the designation and public funds were allocated to Jefferson County to fund the Employer. At all times since 1972, the Employer has been designated to provide legal service by the DPA and has been approved to furnish such services by the Public Advocate. Pursuant to Chapter 31 of the KRS, Jefferson County also contributes to the annual costs of its public advocacy program by paying the expenses incurred in excess of the state contribution. Since about 1972, the State and Jefferson County have agreed to contribute toward the costs of the program with the State paying approximately two-thirds and the County one-third of the total costs. For example, the Employer's operational plan for the current fiscal year specifies that the DPA (State) will pay \$2,517,200 to fund the Employer and that Jefferson County will contribute \$1,225,000. The Employer may also receive funding from other sources such as charitable donations and grants; however, it appears that funding from such sources is negligible.

A seven-member Board of Directors governs the Employer's operations. The Louisville Bar Association appoints six members of the Board of Directors and the seventh member is appointed by the Jefferson County Judge/Executive, an elected official, or his successor in authority in Jefferson County. Vacancies on the Board are filled by the entity that appointed the member to the seat vacated. The Employer is managed and supervised on a day-to-day basis by the executive director, Daniel Goyette, who also holds the title of District Public Defender. Goyette was appointed to the position by the Board of Directors with the approval of Jefferson County and the DPA. I note, however, that such approval is not specifically provided for in the statute or by the Employer's articles of incorporation.

In addition to overseeing day-to-day operations, Goyette is vested with the authority to determine the conditions of employment for the Employer's employees. Indeed, Goyette recruits, hires, and discharges employees without the prior approval of the Board of Directors, the Public Advocate, or any other entity. Goyette may interview for hire applicants recommended by the Board of Directors or the Public Advocate, but he makes the final decision on whether an individual will be employed. Additionally, the Employer establishes job classifications and determines pay raises for its employees. Goyette determines the amount of each employee's wage increase based in part on merit considerations. In this regard, Goyette receives recommendations for pay increases for staff attorneys from their division chiefs. The Employer, through Goyette, also determines other conditions of employment for the unit employees, such as sick leave policy, holiday leave policy, disability leave policy, compensatory time policy, and which employees will be offered the limited training slots at the annual Trial Practice Institute's National Criminal Defense College in Macon, Georgia.

The Employer attempts to keep the starting pay rate for new attorneys as well as wages for more senior attorneys in line with the salary offered by the DPA. Additionally, the Employer strives to maintain parity in benefits with those offered to the employees employed directly by the DPA. However, the Employer is not required to maintain parity in benefits or wages with the DPA. For example, there is no evidence of a minimum or maximum wage scale to which the Employer must adhere. The Employer's employees are paid from its own corporate account. In contrast, the DPA employees are paid by the State. The Employer's employees have their own retirement plan and health insurance separate from the retirement and health insurance benefits offered to the DPA and other State employees. An employee who is disciplined or terminated by the Employer has no right of appeal from such action, but there is some indication that he/she could protest the Employer's decision to the Board of Directors or to the PAC. In contrast, employees of the DPA are under the State Merit System and consequently may appeal adverse personnel actions to the Kentucky Personnel Board.

The Employer leases its principal office space at 719 West Jefferson Street in Louisville from a private entity. The Employer is also provided with work space in the Judicial Center, which houses the Jefferson County Circuit Court. In addition, the Employer will have space allotted to it in the Hall of Justice which is currently being renovated and will, in the future, house the County District Courts. The Employer also holds title to nine vehicles that are used by its investigators.

Pursuant to its current operational plan, the Employer provides the DPA with a list of the attorneys participating in the Jefferson County Public Defender system and furnishes the DPA with regular updates to reflect staff attorney changes. The record also discloses that the Employer's employees may attend at a reduced rate of tuition two training sessions that are conducted annually by the DPA. Such public advocate training is often conducted on a statewide basis. In this regard, the Employer, the DPA, and presumably other public advocacy systems across the state share resources and personnel in conducting training and orientation for new attorneys. In addition, the Employer provides the DPA with a quarterly summary of caseload data. This data is utilized in part by the DPA to assess funding needs for the Employer. Moreover, the Employer abides by the DPA's sexual harassment policy, and the Employer's nondiscrimination policy is the same as that of the DPA.

When a judge authorizes the Employer to receive payment for the use of experts or other ancillary legal services, the Employer requests, pursuant to statute, that the State pay the costs directly to the expert or other service provider. Thus, these costs are in excess of the annual budgeted funds paid to the Employer for its services.

Goyette or his designee often attends quarterly meetings conducted by the Public Advocate. However, the Employer's officials are not required to attend such meetings. Moreover, issues impacting on the wages, hours, and working conditions of the Employer's employees are only rarely discussed and there is no showing that any findings by the participants at such meetings would be binding on the Employer.

The Employer is linked to other public advocacy systems, including the DPA, across the state through an e-mail system. However, direct access to this system for the Employer is limited to Goyette, his secretary, and the Employer's chief of computer services. The Employer participates with other public advocacy systems in compiling training manuals and its employees contribute to The Advocate, an official quarterly publication of the DPA, as well as a monthly publication called the DPA Newsletter. With regard to casehandling, indigent appeals across the state are handled by the DPA with the exception of one or two offices that process their own appeals. The Employer is one of the public advocacy systems that handles its own appeals, with some limited exceptions, including conflict of interest. In these instances, the DPA handles the appeal. There is also apparently some contact between the Employer's attorneys or managers and DPA attorneys. For instance, on occasion, the Employer will take a case for another public advocacy system and the beneficiary county may in return accept one or more of the Employer's cases.

### **ANALYSIS:**

In *Management Training Corporation*, 317 NLRB 1355 (1995), the Board held that in determining whether to assert jurisdiction over an employer with close ties to a governmental entity it would consider only whether such employer meets the definition of "employer" in Section 2(2) of the Act and the applicable monetary jurisdictional standards. In determining whether an entity is an exempted "employer" within the meaning of Section 2(2) of the Act, the Supreme Court established a two-prong test set forth in *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971). In *Hawkins County*, the Supreme Court held that for an employer to qualify as an exempt political subdivision under Section 2(2) of the Act, it must be either: (1) created as a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or the general public.

The Employer contends that it was established as a department or administrative arm of the State of Kentucky and is, therefore, exempt from the Board's jurisdiction as a political subdivision under the first prong of the *Hawkins County* test. Based on a careful review of the record, the briefs of the parties and applicable precedent, I disagree. Although the Employer is a nonprofit charitable corporation, which receives the vast majority of its funding from state and county sources, there is no evidence that it was established as a department or arm of any governmental entity. *Management Training Corporation*, supra. To the contrary, the record discloses that the Employer was established as an independent nonprofit charitable corporation to provide legal representation and services to indigent persons in Jefferson County.

In conformity with the Employer's by-laws, Goyette manages and supervises the day-to-day activities and operations of the corporation. In this connection, Goyette exercises complete control over labor relations and personnel related issues such as hiring and firing, setting wages and granting pay raises, establishing and maintaining benefits, and setting an array of other employment terms and conditions. The Employer also maintains its own health insurance and retirement plans. Moreover, the Employer's employees are not under the State Merit System, and are paid by the corporation rather than the State. There is no evidence that the Employer receives any significant input or oversight by any governmental entity in carrying out its functions. The Employer has wide latitude to independently establish its own budget priorities

within its funding limitations. Finally, I note that the Employer leases its primary office space from a private entity and holds title to a fleet of nine vehicles.

Contrary to the assertion in the Employer's brief, the fact that the services provided by the Employer are available elsewhere in Kentucky directly from the DPA, arguably an exempt political subdivision under the *Hawkins County* test, is not determinative of whether the Employer is a department or an administrative arm of a governmental entity. The Employer has not cited any Board precedent that supports a finding that it was established by the State of Kentucky as a department or administrative arm of the government. In *Oklahoma Zoological Trust*, 325 NLRB No. 17 (1997), cited by the Employer, the Board found that the employer satisfied the second prong of the *Hawkins County* test because all members of its controlling board were either public officials or selected by public officials and were subject to removal by the district court. The Board did not find that the employer in *Oklahoma Zoological* satisfied the first prong of the *Hawkins County* test as a department or administrative arm of the government. *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266 (6<sup>th</sup> Cir., 1990), also relied on by the Employer, does not support its position that it is a political subdivision of the State of Kentucky. In *Moir*, the Sixth Circuit merely recognized that an employer that satisfies either prong of the *Hawkins County* test is an exempt governmental entity.

The Employer also maintains that it is administered by individuals responsible to public officials or the general public and is an exempt entity under the second prong of the *Hawkins County* test. The Employer's position in this regard lacks merit. Initially, only one of the Employer's seven board members is a public official. In *Enrichment Services Program, Inc.*, 325 NLRB No. 154 (1998), the Board found an employer, where one-third of its members were responsible to public officials, was not an exempt governmental entity, overruling *Woodbury County Community Action Agency*, 299 NLRB 554 (1990), and *Economic Security Corp.*, 299 NLRB 562 (1990). Here, the Employer is clearly not responsible to public officials or the general electorate. Instead, the Employer is responsible primarily to a private board of directors and its day-to-day operations are directed by an executive director appointed by the board. *Enrichment Services Program, Inc.*, supra.

The Employer's assertion in its brief that it is responsible to public officials and a *de facto* instrumentality of the State because it seeks advice from the Public Advocate on certain issues and operates pursuant to a contract with the Public Advocacy Department lacks support in the record or law. I am not aware of any Board precedent, and the Employer has not cited any, which would support its contentions that a contractual relationship and consultation between an entity and governmental officials, standing alone, divest the Board of jurisdiction. Finally, the Employer's suggestion in its brief that it is exempt from the Board's jurisdiction because of the possible control that could be exercised over its operations by the Department of Public Advocacy is not supported by Board precedent. In this regard, I note that the Board's prior policy, established in *Res-Care, Inc.*, 280 NLRB 670 (1986), in which it declined to assert jurisdiction over employers because they could not engage in meaningful collective bargaining based on the control exercised over their operations by exempt entities, was overruled by *Management Training Corp.*, supra.

Based on the foregoing, the entire record, and careful consideration of the arguments of the parties at the hearing and in their briefs, I find that the Employer, which admittedly satisfies the Board's applicable monetary standards for asserting jurisdiction, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. *Management Training Corporation*, supra; *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, supra. Accordingly, it will effectuate the policies of the Act to assert jurisdiction over the Employer's operations.

4/ The Employer employs approximately 34 employees in the unit found appropriate. There is no history of collective bargaining affecting any of the Employer's employees. The Employer's operation consists of four principal divisions, namely, adult, juvenile, appellate, and capital divisions. The Employer employs 25 staff attorneys and an additional 9 attorneys who are awaiting their bar exam results. In addition to the attorneys whom the Petitioner seeks to represent, the Employer employs nine investigators, two law clerks, and an unspecified number of paralegal and clerical employees. In managing the Employer, Goyette is assisted by Deputy Defender Leo Smith, four division chiefs, and the supervisors for the other professional and clerical employees.

The parties stipulated, and I find, that all full-time and regular part-time nonsupervisory staff attorneys, including law school graduates who are awaiting bar results, employed by the Employer at its Louisville, Kentucky facility, excluding all office clerical employees and all other professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining. Accordingly, I shall direct an election among the employees in such unit.

In accord with the stipulation of the parties and the record evidence, I shall exclude the following individuals from the unit as supervisors within the meaning of Section 2(11) of the Act: Daniel Goyette, Executive Director and District Public Defender; Leo Smith, Deputy Public Defender; Don Meier, Supervisor; Betty Neime, Supervisor; Pete Schuler, Supervisor; Ann Smith, Supervisor; Patty Eschner, Supervisor; and Frank Heft, Supervisor.

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